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No. 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND BORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 33-39) is reported at 254 F. 2d 483. The opinion of the Tax Court of The United States (R. 18-29) is reported at 27 T.C. 149.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1957 (R. 33). On February 10, 1958, by order of Chief Justice Earl G. Warren, the time within which to file a petition for a writ of certiorari was extended to April 11, 1958 (R. 41). The petition was filed on April 9, 1958 and was granted on May 19, 1958 (R. 42). The jurisdiction of this Court rests on

28 U.S.C. 1254(1) and 26 U.S.C. 7482(a). The time for bringing this action rests on 28 U.S.C. 2101(c) and on Rule 22(3) of the Revised Rules of The Supreme Court of The United States.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

(a) Constitution of The United States, Amendment Thirteen. (App. A, p. 1a).

(b) 44 Stat. 125, 42 U.S.C. Sec. 1994 (1952 ed.) derived from R.S. Sec. 1990. (App. A, p. 1a).

(c) Internal Revenue Code of 1939, Section 22(n), as amended by Section 8, Individual Income Tax Act of 1944, C. 210, 58 Stat. 235. (26 U.S.C. Sec. 22(n), 1952 ed.). (App. A, p. 1a).

(d) Internal Revenue Code of 1939, Section 23(a)(1)(A), as amended by Section 121(a) of Revenue Act of 1942, C. 619, 56 Stat. 819. (26 U.S.C. Sec. 23(a)(1)(A), 1952 ed.). (App. A, p. 2a).

(e) Internal Revenue Code of 1954, Section 162(a)(2), as enacted by Public Law 591, C. 736, 68A Stat. 45. (26 U.S.C. Sec. 162(a), 1952 ed., Sup. II). (App. A, p. 2a).

(f) Revenue Act of 1921, Section 214(a), C. 136, 42 Stat. 239. (App. A, p. 2a).

(g) Internal Revenue Code of 1939, Section 24(a)(1), as amended by Section 127(b) of Revenue Act of 1942, C. 619, 56 Stat. 826. (26 U.S.C. Sec. 24(a)(1), 1952 ed.). (App. A, p. 3a).

(h) Internal Revenue Code of 1954, Section 262, as enacted by Public Law 591, C. 736, 68A Stat. 76. (26 U.S.C. Sec. 262, 1952 ed., Sup. II). (App. A, p. 3a).

(i) Revenue Act of 1921, Section 215(a), C. 136, 42 Stat. 242. (App. A, p. 3a).

(j) Treasury Regulation 118, Section 39.22(n)-1, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.22(n)-1. (App. A, p. 3a).

(k) Treasury Regulation 118, Section 39.23(a)-1, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.23(a)-1. (App. A, p. 4a).

(l) Treasury Regulation 118, Section 39.23(a)-2, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.23(a)-2. (App. A, p. 4a).

(m) Treasury Regulation 103, Section 19.23(a)-2, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1940 Supp.) Section 19.23(a)-2. (App. A, p. 5a).

QUESTIONS PRESENTED

(1) Where petitioners entered upon certain construction employments away from their established residences prior to the taxable year for periods lasting approximately 20½ months, 12½ months and 8½ months, respectively, and terminated such employments during the taxable year, the question is presented as to whether or not the amounts expended during the taxable year for—

(a) board and lodging while so employed as construction workers at or near the construction site, and for

(b) transportation to return to their respective residences upon termination of such employments are nondeductible expenses within the provisions

of Section 24(a)(1) of the Internal Revenue Code of 1939, as amended.

(2) If it is determined that said expenditures are not personal within the provisions of Section 24(a)(1), the further question is presented as to whether or not the expenses in question are deductible under the provisions of Section 23(a)(1)(A) and Section 22(n) of the Internal Revenue Code of 1939, as amended.

STATEMENT

A. Prefatory

All of the petitioners herein filed timely income tax returns for the year 1953 (R. 8, 11, 15).

Petitioner Betty O. Stines did not have taxable income during the taxable year 1953 here involved. She appears as a petitioner in this proceeding as a nominal party by virtue of filing a joint income tax return with her spouse, Paul V. Stines (R. 11, 21).

Petitioner Doris D. Hall filed a separate income tax return for the year 1953 and appears as a party to this proceeding only in respect to the matter of procuring the benefits allowed a husband and wife who file a joint return. The respondent has conceded that petitioners John S. Hall and Doris D. Hall are entitled to compute their income taxes for the year 1953 under the statutory provisions pertinent to the filing of joint returns and this matter is not in issue in this proceeding (R. 24).

The term petitioners is hereinafter used to refer to the petitioners, James E. Peurifoy, Paul V. Stines and John S. Hall.

In their respective returns, each of the petitioners claimed as a deduction for travel expenses an amount

which is greater than the amount stipulated to be correct in respect to each of the petitioners (R. 25). No controversy exists as to the action of the respondent in disallowing the amounts in excess of the stipulated amounts. The issues herein are concerned only with the action of the respondent in disallowing the deductions claimed for travel expenses which were incurred in fact and which are stipulated to be correct as to their amounts.

There is no dispute over the applicability of Section 22(n) of the Internal Revenue Code of 1939. If the expenses in question are held to be deductible under the provisions of Section 23(a)(1)(A), they are deductible under the provisions of Section 22(n) relating to the determination of adjusted gross income (R. 29).

B. Judicial History of Proceedings Below

The travel expenses here in controversy were administratively disallowed by the respondent for the alleged reason that they constituted "personal and living expenses" the deduction of which is prohibited by Section 24(a)(1) of the Internal Revenue Code of 1939. Identical explanations for such action in disallowing the claimed expenses appear in each of the statutory 90 day letters sent to each of the petitioners (R. 21, 22, 23, 24).

Petitioners contested the deficiencies resulting from the disallowance of the claimed expenses and filed timely petitions in the Tax Court of The United States. The actions were consolidated for trial and after a hearing on the matter, a decision was rendered by the Tax Court of the United States under date of October 31, 1956 (R. 18). In its opinion, which was reviewed by the court without dissenting opinion, the Tax Court

sustained petitioners in their claims for the deduction of the expenses in the amounts stipulated (R. 29).

The Commissioner of Internal Revenue appealed the decision of the Tax Court to the United States Court of Appeals For The Fourth Circuit. This latter court, in its opinion entered under date of November 11, 1957, reversed the holding of the Tax Court of the United States (R. 39). The matter is now before this Court by grace of petition for a writ of certiorari granted under date of May 15, 1958 (R. 42).

C. Facts Pertinent to All Petitioners

All of the petitioners are construction workers and are employed in the heavy construction industry (R. 8, 11, 14). All of the petitioners are members of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, which is hereinafter referred to as the Union (R. 19).

Each of the petitioners obtains employment through the respective local headquarters of the Union local of which he is a member. The respective Union locals send them to various construction sites where they are then hired by representatives of the employers (R. 9, 12, 15, 16, 19). The hiring procedure consists of procuring a "referral card" from the Union local. The referral card is presented to a "job steward" at the construction site who is a union member. The job steward then takes the holder of the card to the "job superintendent" who represents the employer and by so doing "clears" the referral card holder as a duly qualified union member. The referral card holder is then "hired" by the job superintendent. The job superintendent has some discretion in hiring in that he can

refuse to hire certain persons for cause, but must eventually hire men "sponsored" by the Union. Upon termination of their respective employments at a job site, petitioners return to their local headquarters for new referrals (R. 9, 12, 15, 16).

Each of the petitioners has an established residence in which he lives and which he "owns". Petitioner Peurifoy owns his home free of debt. Petitioners Stines and Hall were purchasing their homes. In the sense described, all petitioners "owned" their homes during the entire year of 1953 (R. 8, 11, 15).

Each of the petitioners has been a member of the Union for one or more years prior to the taxable year 1953 (R. 9, 12, 16). Each of the petitioners has been employed on numerous construction sites prior to and during the taxable year in various locations in the country (R. 9, 12, 16).

A construction site is not a place of permanent employment for anyone. Upon completion of the construction, both employees and employers must seek employment elsewhere (R. 20, 37). The period of employment on some construction jobs may last for several years but normally an employment period on a construction job lasts for a few weeks or a few months. Construction employment is *certain* to terminate upon completion of the job for all construction workers. The employment of certain skills and trades are terminated prior to the completion of the construction work (R. 20, 37).

It is characteristic of the heavy construction industry that, except for certain projects adjacent to metropolitan areas, the local supply of skilled labor and artisans must be augmented by workers coming

in from other places (R. 19, 37). A customary procedure for procuring the necessary skilled workers is through the mechanism provided by the trade unions. The union locals will contact other union locals in order to procure necessary workers. In some instances the national unions will assist in procuring the necessary skilled workers (R. 19, 37).

It is apparent that workers following the heavy construction industry incur expenses for travel that would not be required by a person following the same trade in a fixed locality (Record as a whole). In the instant case, this fact was recognized by the employer of the petitioners by granting a rate of pay which was 14.8c an hour greater than the normal union scale for such work (R. 13, 16, 21).

It is customary for union construction workers to be sent to jurisdictions other than that of their union local for work. A journeyman craftsman may have several different employers in the course of a year or work at several different job sites in the course of a year (R. 19, 20).

D. Facts Pertinent to Petitioner Peurifoy

Petitioner Peurifoy is an unmarried individual and was unmarried during the entire year of 1953. He owned his residence which is located at Kure Beach, North Carolina, for the entire year of 1953. This residence was personally constructed by the petitioner and is clear of any indebtedness. Petitioner Peurifoy resides in this residence whenever employment in the vicinity permits. If his employment is not too remote he returns to this residence on week-ends (R. 8).

He is a pipe welder by trade and is a member of Local No. 329 of the Union. The headquarters of

said local is in Wilmington, North Carolina, which is approximately 20 miles from Kure Beach, North Carolina (R. 8, 9).

Petitioner Peurifoy became a member of the Union on August 13, 1951 (R. 9). His employment itinerary since August 13, 1951 until just before the time of trial in the Tax Court was as follows (R. 9, 10):

Employment Site	Starting Date	Duration
Acme, North Carolina	8/13/51	7 months
Kinston, North Carolina	3/10/52	20½ months
Mount Misery, North Carolina	11/30/53	17½ months
Cherry Point, North Carolina	5/16/55	3 months
Acme, North Carolina	Not known	2 weeks
Barberton, Ohio	10/ 3/55	1 week

The particular employment of petitioner Peurifoy involved in this proceeding is that at Kinston, North Carolina, which began on March 10, 1952 and lasted for approximately 20½ months and ended on or about November 20, 1953. While employed at or near Kinston, North Carolina, petitioner Peurifoy roomed and boarded at a boarding house located approximately one mile from the construction site. Necessary transportation for petitioner Peurifoy was provided by driving his personal automobile (R. 9, 10).

During the year 1953 petitioner Peurifoy expended the sum of $496.00 for meals and lodging in respect to his employment at Kinston, North Carolina. He expended the further sum of $8.54 for transportation in driving his car from Kinston, North Carolina, to his residence at Kure Beach, North Carolina, upon termination of such employment (R. 9, 10, 20).

These expenses in the respective amounts of $496.00 and $8.54, which have been stipulated as to said

amounts, are the expenses in controversy in this proceeding in respect to petitioner Peurifoy. (R. 25).

E. Facts Pertinent to Petitioner Stines

Petitioner Paul V. Stines and petitioner Betty O. Stines are husband and wife. They have one child who is a minor. They maintained a residence in Raleigh, North Carolina, during the entire year of 1953. They have been the owners of said residence since acquiring said residence in 1952. Betty O. Stines and their child physically resided in this residence during the entire year 1953 (R. 11, 12, 13, 14).

Petitioner Stines is a journeyman plumber by trade and is a member of Local No. 785 of the Union. The headquarters of said local is in Raleigh, North Carolina. Petitioner Stines became a member of the Union sometime in 1947. His employment itinerary since joining the Union until just before the time of trial in the Tax Court is not a matter of detailed record but includes about 30 jobs ranging in duration from two weeks to over a year (R. 21).

His employment itinerary from March 26, 1952 until just before time of trial in the Tax Court is as follows (R. 12, 13, 14):

Employment Site	Starting Date	Duration
Kinston, North Carolina	3/26/52	12½ months
Raleigh, North Carolina	4/13/53	2 weeks
Raleigh, North Carolina	5/ 6/53	6 weeks
Charleston, South Carolina	6/23/53	3 weeks
Raleigh, North Carolina	8/ 1/53	5 months
Fort Bragg, North Carolina	Not known	7½ weeks
Raleigh, North Carolina	12/ 9/53	3 weeks

Each of the above listed employments represents a different construction project even though in or near the same city. The last two employments above listed were made under conditions whereby his employer "loaned" petitioner Stines to other employers. Thus, the 7½ week period and the 3 week period of his employments were included in the 5 months period immediately preceding (R. 12, 13, 14).

The particular employment of petitioner Stines involved in this proceeding is that at Kinston, North Carolina, which began on March 26, 1952 and lasted for approximately 12½ months and ended on or about April 10, 1953. While employed at or near Kinston, North Carolina, petitioner Stines rented a room in a rooming house in Kinston, which is approximately 8 miles from the construction site, and ate his meals in restaurants. Necessary transportation for petitioner Stines was provided by a car pool arrangement with four other persons whereby each member drove his personal car for the benefit of all for approximately 1/5 of the time necessary.

During the year 1953, petitioner Stines expended the sum of $262.50 for meals and lodging in respect to his employment at Kinston, North Carolina. He expended the further sum of $1.09 for transportation costs under his car pool arrangement in returning to his residence in Raleigh, North Carolina, upon termination of such employment (R. 12, 13, 21).

These expenses in the respective amounts of $262.50 and $1.09, which have been stipulated as to said amounts, are the expenses in controversey in this proceeding in respect to petitioner Stines (R. 14, 21, 25).

In respect to his employment at Charleston, South Carolina, which began on June 23, 1953 and lasted for a period of approximately 3 weeks, petitioner Stines expended the sum of $57.00 for meals and lodging and expended the further sum of $42.00 for transportation to and from such place of employment (R. 22). These expenditures in the respective amounts of $57.00 and $42.00 have been conceded by the respondent to be properly deductible and are not in issue in this proceeding (R. 27).

In respect to his employment at Fort Bragg, North Carolina which lasted for a period of approximately 7½ weeks, petitioner Stines expended the sum of $155.63 for meals and lodging and expended the further sum of $7.00 for transportation in driving his car to and from such place of employment (R. 22). These expenditures in the respective amounts of $155.63 and $7.00 have been conceded by the respondent to be properly deductible and are not in issue in this proceeding (R. 27).

F. Facts Pertinent to Petitioner Hall

Petitioners John S. Hall and Doris D. Hall are husband and wife. They have three children, all of whom are minors. During the entire year of 1953, petitioners Hall maintained a residence in Raleigh, North Carolina. Petitioners Hall maintained said residence for approximately four years ending in the early part of 1954. Petitioners Hall were the owners of said residence in the sense that they were purchasing the residence. They sold the residence in the latter part of 1953 but continued to maintain a residence there until the early part of 1954. Doris D. Hall and their three children physically resided in said residence during the entire year 1953.

Petitioner Hall is a welder by trade and is a member of Local No. 785 of the Union. The headquarters of said local is in Raleigh, North Carolina (R. 15). Petitioner Hall joined the Union in 1951. The stipulation of facts states petitioner Hall joined the Union in 1952. This is manifestly in error as disclosed by the employment itinerary of petitioner Hall. The correct date should be 1951 (R. 16).

His employment itinerary since joining the Union until just before trial in the Tax Court is as follows (R. 16, 17, 18):

Employment Site	Starting Date	Duration
Neuse, North Carolina	Not known	1 year
Kinston, North Carolina	10/21/52	8½ months
Raleigh, North Carolina	7/13/53	7½ months
Portsmouth, Ohio	Not known	3½ months
Aiken, South Carolina	Not known	2 weeks
Hopewell, Virginia	Not known	7 months
Tarboro, North Carolina	Not known	1 month
Moncure, North Carolina	Not known	3 months
Moncure, North Carolina	Not known	3 months

The particular employment of petitioner Hall involved in this proceeding is that at Kinston, North Carolina, which began on October 21, 1952 and lasted for approximately 8½ months and ended on or about July 10, 1953. While employed at or near Kinston, North Carolina, petitioner Hall rented a room in a rooming house in Kinston which is approximately 8 miles from the construction site and ate his meals in restaurants. Petitioner Hall paid a fellow worker for transportation a flat amount of $6.50 a week which included daily round trips to the plant from the rooming house and one round trip from Raleigh, North Carolina, to Kinston, North Carolina, on week-ends (R. 16).

During the year 1953 petitioner Hall expended the sum of $530.13 for meals and lodging in respect to his employment at Kinston, North Carolina. He expended the further sum of $2.01 for transportation to return to his residence in Raleigh, North Carolina, upon termination of such employment (R. 16, 23).

These expenses in the respective amounts of $530.13 and $2.01, which have been stipulated as to said amounts, are the expenses in controversy in this proceeding in respect to petitioner Hall (R. 16, 25).

SUMMARY OF ARGUMENT

The doctrine implemented by the Court of Appeals below that a taxpayer's "home is synonymous with a place of indefinite employment" is a development of the earlier doctrine that a taxpayer's "home is synonymous with his place of employment or post of duty". Both doctrines are erroneous in that they improperly erect an evidentiary matter into positive rules of substantive law not sanctioned by the statute or by this Court in the controlling decision of *Commissioner* v. *Flowers*, 326 U.S. 465.

The doctrines were created in order to deny taxpayers a deduction for travel expenses under factual conditions whereby the taxpayers maintained their homes distant from their places of employment as a matter of "personal choice of" or as a result of the "personal propensities of" the particular taxpayer involved. This problem is properly placed under the provisions of Section 24(a)(1) of the Internal Revenue Code of 1939, not under the provisions of Section 23(a)(1) of the said code. Both doctrines are erroneous, however, in that they attempt to solve the problem

arising under Section 24(a)(1) by erecting a new rule of substantive law instead of making a simple factual determination of whether or not the expenses in question result from the "choice of" or "personal propensities of" the taxpayer. The logical starting point is to determine whether or not under *all* the facts it is reasonable to expect the taxpayer to move his home to his place of employment. A preliminary decision on this question immediately denies the deduction to the taxpayer if it *is* factually determined he is maintaining his home distant from his employment for "personal" reasons. A determination that it is *not reasonable* to expect him to move to his place of employment eliminates the "personal" aspect of the problem and clarifies the situation for a separate and independent determination of the deductibility of the expenses under the three requirements established in the statute and in the *Flowers* case.

In many lower court decisions, the courts have erroneously applied the concept of "home being synonymous with post of duty or indefinite post of duty" to the problems raised by Section 23(a)(1)(A). The result has been to develop and impose new and additional requirements for deductibility of travel expenses which are not sanctioned by the statute or by this Court. The mushrooming requirements of the technical qualifications for "temporary" employment, which has developed into a meaning of being opposed to "indefinite" employment, has acquired no less than four qualifications for "temporary" employment. The result now being that the failure of a taxpayer to meet any one of these four additional requirements will result in a denial of the deduction even though he fully meets the three requirements of the *Flowers* case and the statute.

The term "personal" has come to be loosely and improperly applied to any expenses deemed non-deductible by the Courts for any of the seven reasons now producing denial of the deduction.

This is exactly what happened in the instant case. The respondent originally disallowed the expenses for the sole reason he alleged them to be "personal and living expenses" in his statutory 90 day letters. The Tax Court determined as a question of fact that the expenses were not personal and that the three requirements of the *Flowers* case had been met. The Court of Appeals below held that the petitioners failed to meet their burden of showing the employments were *temporary,* thus concluding the expenses were not deductible, and since they were considered non-deductible, alleged such expenses were "personal". The *factual* determination of the Tax Court that the expenses were *not personal* thus remains undisturbed.

The Tax Court further determined as a conclusion of fact that the employments *were* temporary and it is submitted that this determination is correct.

It is further submitted that the Court of Appeals below was influenced in its decision in determining the employments were not temporary by the fact the petitioners on several occasions voluntarily quit their employments. A consideration of this factor in resolving the deductibility of travel expenses adversely to petitioners exercises a coercive influence in that it deters petitioners from voluntarily terminating their employment and is in contravention of the Thirteenth Amendment to the Constitution of the United States. In this respect, it is to be noted that if the decision of the Court of Appeals below is allowed to stand, it erects

a new requirement for qualification for "temporary" employment. For under the decision below petitioners apparently can not qualify for "temporary" employment if they voluntarily quit their jobs. This would raise the requirements for deductibility to eight instead of three, as established in the *Flowers* case.

ARGUMENT

I

SECTION 23(a)(1)(A) AND SECTION 24(a)(1) OF THE INTERNAL REVENUE CODE OF 1939 ARE SEPARATE AND INDEPENDENT SECTIONS WHICH REQUIRE SEPARATE AND INDEPENDENT DETERMINATIONS OF THEIR APPLICATION TO THE FACTS. THE COURT OF APPEALS BELOW ERRONEOUSLY CONCLUDED THE EXPENSES IN CONTROVERSY WERE PERSONAL UNDER SECTION 24(a)(1) AS A RESULT OF ITS ERRONEOUS DETERMINATION THAT THEY WERE NONDEDUCTIBLE UNDER SECTION 23(a)(1)(A).

The issues in this proceeding involve the interpretation and application of two sections of the Internal Revenue Code of 1939. These are Sections 24(a)(1) and 23(a)(1)(A), the provisions of which are as follows:

> "Sec. 23. *Deductions From Gross Income.*
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (a) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

"Sec. 24. *Items Not Deductible.*

(a) *General Rule.*

In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except . . ."

The language of these two sections is substantially identical with the corresponding provisions in the Internal Revenue Code of 1954. (I.R.C. of 1954, Sec. 162(a)(2) and Sec. 262). The exact language of these provisions of the Internal Revenue Code of 1954 is set forth in the appendices (App. A, pp. 2a, 3a). Accordingly, a determination of the issues in this proceeding will be applicable to the corresponding provisions of the Internal Revenue Code of 1954.

That these two provisions are separate, independent and autonomous sections of the Code seems self evident. The operation and effect of Section 24(a)(1) ought not be dependent upon Section 23(a)(1)(A). A determination that a particular expenditure is "personal" under Section 24(a)(1) should not require a reference to Section 23(a)(1)(A). There are many expenses other than travel expenses which have been judicially determined to be "personal" and hence nondeductible by direct mandate of Section 24(a)(1). (See examples in App. B, p. 5a). For purposes of determining nondeductibility under Section 24(a)(1), no reference to Section 23(a)(1)(A) is necessary or proper. Inquiry as to nondeductibility under Section 24(a)(1) is a logical condition precedent to an inquiry as to deductibility under Section 23(a)(1)(A). This is so for the reason that a determination that a particular expense is personal and therefore non-

deductible under 24(a)(1) renders further inquiry under Section 23(a)(1)(A) unnecessary and completely superfluous.

It is respectfully submitted that much of the confusion latent in this problem lies in the failure of the courts to recognize the separate and distinct application of these two sections of the code to the problem. It would seem obvious that an expense may not be "personal" as that word is used in Section 24(a)(1) and yet not be deductible under Section 23(a)(1)(A). There are many examples of such expenses (see examples in App. C, p. 6a). This approach recognizes three classes of expenditures rather than two classes as normally rationalized in respect to the problem. These classes are (1) deductible business expenditures, (2) nondeductible business expenditures and (3) nondeductible personal expenditures.

The problem of distinguishing deductible from nondeductible business expenditures is a matter falling within the orbit of Section 23(a)(1)(A). However, the matter of distinguishing business expenditures (whether deductible or nondeductible) from personal expenditures is a matter falling within the orbit of Section 24(a)(1).

In respect to the matter of resolving whether or not certain travel expenses are deductible business expenses or nondeductible business expenses, this Court in the case of *Commissioner* v. *Flowers*, 326 U.S. 465,470, laid down *three* criteria for determining such deductibility. These three criteria are substantially identical with the criteria established in Section 23(a)(1)(A) of the statute and in the regulations. It is to be noted that the language of the instant effective

regulation is substantially identical to that of the regulation in effect when this problem was considered by this Court in the *Flowers* case. (App. A, p. 5a).

In respect to the problem of resolving whether or not certain travel expenses are business (whether deductible or nondeductible) or personal, there remains the question of determining what criteria shall be used for such determination.

It is respectfully submitted that a determination of whether or not a particular travel expense is, or is not, a "personal" expense, as used in Section 24(a)(1), is primarily a question of fact. (See examples in App. B, p. 5a). Petitioners respectfully submit that the "personal" nature of a particular travel expense should be resolved in the manner employed by the Tax Court below by determining whether or not, in consideration of *all* the pertinent facts and circumstances, the taxpayer would reasonably and normally be expected to move his home to his place of employment or post of duty. (R. 27, 29). This doctrine was also recognized in the cases of *E. G. Leach*, 12 T.C. 20 (1949), and *Albert P. Tiernan*, P-H T.C. Mem. Dec., Par. 55,059 (1955).

It is further submitted that this is substantially the same concept advanced by the Supreme Court in the *Flowers* case wherein it said (326 U.S. at p. 474):

> "Travel expense in pursuit of business within the meaning of Section 23(a)(1)(A) could arise only when the railroad's business *forced* the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad." (Emphasis added).

How is one to decide when the travel is "forced" by the business or results from the "personal choice" of taxpayer in locating his home distant from his place of employment? The answer lies in *first* determining where a normal taxpayer would reasonably be expected to maintain his home in the light of all the facts.

The respondent's position, which maintains that "taxpayers' homes shift to every new place of indefinite employment", renders the meaning of the word "home" unintelligible. Taxpayer may have a home in which he and his family permanently reside and which is a "home" in every sense of the word as that word is commonly understood. Being away from this home does not satisfy the respondent. He may have a business headquarters with his union local which is recognized as a "tax home" under rulings issued by the Commissioner. (Special Letter Ruling of May 4, 1956, P-H Fed. Tax Service 1957, Par. 76,519). In the proceedings below, respondent conceded that the headquarters of the respective union locals were the "tax homes" of the petitioners. Being away from this home does not satisfy the respondent. Under respondent's theory, petitioner has a third home, which is any location at which he happens to be "indefinitely" employed. Petitioner can *never* be away from this "home" under the respondent's theory. It is submitted that such an interpretation violates the spirit and intendment of the statute.

The circumstances under which a normal man would reasonably be expected to move his home to a place of employment is a practical problem. It is not a matter of legal metaphysics. Petitioners herein are engaged in an occupation where employment is irregular and

uncertain. They travel to job sites as needed. Such factors as inclement weather, strikes, material or labor shortages may produce sudden and unforeseen termination of their employment as a normal aspect of the industry. Employment at any particular site may vary from weeks, to months, to several years. Such work, by its inherent nature, can never ripen into permanence or stability. Inevitably, the construction work is completed and both employers and employees must move to another location. Petitioners' places of employment have no stability and no permanence. The tax laws of this country should not require the constant uprooting of homes and their reestablishment at each new job site. Petitioners here only ask that they be given the same treatment employers are given when they establish homes. Petitioners have no knowledge of any cases in which the "temporary versus indefinite" concept has been applied to an employer.

Under these circumstances, any justification for asserting that a taxpayer "home is synonymous with his post of duty", temporary or otherwise, ceases to exist. A construction site is not an established place of business or employment for *anybody*. The entire operation is in a travel status.

It is submitted that under such circumstances it is not reasonable or logical to require a taxpayer to uproot an established home and move his home to a construction site. Travel expenses incurred by a taxpayer following his trade as a construction worker under these circumstances are not "personal" expenses in the sense that such expenses are occasioned by the "personal propensities" of the taxpayer as was the

situation in *Commissioner* v. *Flowers*, 326 U.S. 465. Such expenses are the natural, normal and customary expenses incurred by petitioners in following their trade and are therefore incurred in "pursuit of a trade" as those words are used in the statute and in requirement three set forth in *Commissioner* v. *Flowers*, 326 U.S. 465,470.

It is to be noted that the employments of petitioner Stines at Charleston, South Carolina, and Fort Bragg, North Carolina, in the taxable year 1953 here involved were conceded by the respondent to give rise to deductible expenses. Since petitioner Stines had been consistently following the same pattern of working and living throughout the taxable year, it would seem that the expenses incurred at the Kinston job site, which are herein in dispute, were incurred in "pursuit of his trade" to the same degree as similar expenses incurred at Charleston and Fort Bragg, which are conceded to be deductible.

This comparison again emphasizes that the conclusion of the Court of Appeals below that the expenses in dispute were "personal" is not based on a determination of fact. It is the result of the action of such court of first denying the deduction by erroneously applying the doctrine that "a place of indefinite employment is tantamount to tax home" and then classifying such expense as "personal" for the reason the court itself deemed them nondeductible.

The statutory 90 day letters, upon which jurisdiction of the proceedings in the Tax Court was based, denied the deduction to the petitioners for the reason such expenses were deemed "personal and living" expenses. The Tax Court in its opinion, and on the basis of the

facts, resolved this question favorably to the petitioners saying (R. 27):

> "In this situation we are of the opinion that when any of the petitioners accepted temporary employment away from the places of their residence, they reasonably could not have been expected to establish a residence at the places of employment. In those instances the expenses incurred at the place of employment are considered as being due to the exigencies of the trade or business."

The decision of the Court of Appeals below was based on the position that petitioners failed to meet their burden of showing that the employment was "temporary". It is submitted the facts clearly show these employments were in fact temporary as found by the Tax Court.

It is further submitted that the finding of *fact* by the Tax Court that the expenses in question were not personal *was not overruled by the Court of Appeals.* The Court of Appeals below held that the taxpayers failed to meet their burdens of showing that the employments were *temporary.* The Court of Appeals then *alleged* the expenses in question were personal. As elsewhere noted, this conclusion was *not* based on the *facts,* but resulted from the action of the Court of Appeals in denying the deduction by applying the "home is synonymous with place of indefinite employment" doctrine and then labeling such expenses "personal" because the court itself considered them nondeductible. Thus the factual determination by the Tax Court that the expenses in question were *not* personal remains undisturbed.

The confusion and complexities arising from interrelating the two sections in the manner in which it was done by the Court of Appeals below thus becomes apparent. It is submitted that a factual determination of the applicability of Section 24(a)(1) should precede a determination under Section 23(a)(1)(A). A determination that particular travel expenses are incurred as a result of the "choice of" or "personal propensities of" the taxpayer immediately resolves the problem.

A determination that particular expenses are not the result of the choice of "personal propensities" of the taxpayer *does not* dispose of the problem but clears the ground for logically applying the three requirements of the *Flowers* case.

II

THE WORD "PERSONAL" AS USED IN SECTION 24(a)(1) OF THE INTERNAL REVENUE CODE OF 1939 RAISES A PRELIMINARY QUESTION OF FACT AS WELL AS A QUESTION OF LAW. THE COURT OF APPEALS BELOW ERRONEOUSLY FAILED TO MAKE A FACTUAL DETERMINATION UNDER SECTION 24(a)(1).

In the statutory 90 day letters the respondent originally denied the deductions to the petitioners for the alleged reason that the expenses in question constituted "personal and living" expenses. The Tax Court below in its factual determination concluded that on the basis of all the facts that it was not reasonable to expect any of the instant petitioners to shift their residences to the place of employment or to regard Kinston as their "home" for tax purposes (R. 27, 29). The Court of Appeals below reversed the Tax Court, which held that the expenses in question were deductible for the alleged reason taxpayers failed to sustain their burden of proof to the effect the

work was "temporary". The Court of Appeals below *did not rule on the adequacy* of the evidence to sustain the factual determination of the Tax Court that the expenses in question were *not personal*. Thus, the factual determination of the Tax Court that the expenses here in controversy were *not* personal remains unchallenged.

The language of Section 24(a)(1) is short and would seem to be simple. It provides:

> Section 24. *Items Not Deductible.*
>
> (a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—
>
> (1) Personal, living or family expenses, except . . ."

The language of this provision has been part of the income tax laws of this country from their earliest days and remains substantially unchanged in the present Internal Revenue Code of 1954. (Sec. 215(a), Revenue Act of 1921, printed in App. A, p. 3a; Sec. 262(a), I.R.C. of 1954, printed in App. A, p. 3a).

The separate and autonomous nature of Section 24(a)(1) from Section 23(a)(1)(A) has been herein previously developed. If this position of separate and independent sections is deemed sound, it is logical that a determination of whether or not a particular expenditure is, or is not, personal be made under standards applicable solely to Section 24(a)(1). The standards and requirements erected under Section 23(a)(1)(A) logically and rightly should not be implemented when attempting to resolve the application of Section 24(a)(1).

It is respectfully submitted that the resolution of this question is primarily one of fact. As applied to the instant problem, it is further submitted that the fundamental logic of the situation dictates the obvious standard which was recognized in the opinion of the Tax Court below (R. 27, 29). The standard there employed recognizes that consideration should be given to *all* the facts and circumstances to determine whether or not a normal and reasonable man could be expected to bring his home to his place of employment. A decision of this question would immediately resolve, *on a factual basis*, whether or not the expenses were or were not "personal". A decision on this point to the effect that the expenses in question are not "personal", does *not* determine their deductibility under Section 23(a)(1)(A). This latter question logically is brought to account [illegible]t the three requirements of *Commissioner* v. *Flowers*.

A good example of travel expenditures which are not personal in fact but which are not deductible under Section 23(a)(1)(A), are those incurred by a taxpayer as a result of a housing shortage at a defense plant. The typical case is that of a taxpayer who accepted employment at a plant or installation engaged in producing war materials during World War II and was unable to find housing accommodations for his family He was forced to room and board adjacent to the job site in order to hold his job. Such employment was at a fixed plant location as distinguished from a construction site involved in this proceeding. Travel in connection with such employment was not "ordinary and necessary" to the particular employment or required by the "exigencies of the business". The expenses resulted from the exigencies of the housing

shortage, not the exigencies of the business. However, such expenses were not "personal" in the sense they were the result of the "personal choice of" or "personal propensities of" the taxpayer as was true in the *Flowers* case.

There are several cases involving the housing shortage situation. The courts have customarily denied the deduction on the grounds that the employment was "indefinite". (App. D, p. 6a). It is submitted that the existence of a housing shortage is immaterial to the issues raised by Section 23(a)(1)(A), however pertinent it may be to a determination under Section 24(a)(1) as to whether or not particular expenses were incurred because of the "personal propensities" of the taxpayer.

A classic example of the confusion resulting from injecting the housing shortage situation into the issues under Section 23(a)(1)(A) is revealed in the case of *Willard S. Jones*, 13 T.C. 880 (1949).

The facts in that case were very similar to the facts in the instant case. Petitioner was a union member and a sheet metal worker who followed the heavy construction industry. The expenses there in controversy arose out of his employment in the construction of the atomic energy plant at Oak Ridge, Tennessee. Housing facilities were not available and petitioner lived in barracks supplied for the use of the construction workers. The Tax Court denied such petitioner a deduction for expenses incurred in respect to his employment there on the grounds that such employment was "indefinite" and saying that the absence of housing accommodations would not help petitioner.

The court there utterly failed to inquire as to whether or not such expenses would have been required by the exigencies of the business irrespective of the availability of housing. Jones may not have moved to the job site if housing had been available. Development of this aspect of the case would have revealed the "ordinary and necessary" character of the expenses and their relation to the "exigencies of the business". It is to be noted that there was a vigorous dissent by Justices Murdock and Van Fossan in the *Jones* case.

The basic premise involved here is that Section 23(a)(1)(A) and Section 24(a)(1) are separate provisions requiring separate determinations of their applicability. The determination of the "personal" nature of a particular expenditure is primarily a factual determination which ought not be telescoped onto the determination as to whether the requirements of Section 23(a)(1)(A) have been met.

The customary practice of the courts of alleging that a travel expense is "personal" because the particular court deems it nondeductible is misleading and confusing. As used in Section 24(a)(1) the word "personal" creates both a question of fact and a question of law. The confusion resulting from applying the term "personal" to expenses because they are not deductible is well illustrated by the situation in respect to commuting expenses. Commuting expenses are not "personal" in the factual sense that they are incurred as a matter of "choice" or as the result of the "personal propensities" of the commuter. They are incurred as an unavoidable and necessary expense of pursuing one's work.

Commuting expenses have, nevertheless, been classified as "personal" from the earliest times. In

the case of *Frank H. Sullivan*, 1 B.T.A. 93 (1924), the court (Board of Tax Appeals) said (1 B.T.A. at p. 94):

> "The facts in this appeal differ in no respect from the case of the expenses of a commuter in traveling to and from his place of employment. The rulings of the Commissioner in such cases are consistent and of long standing to the effect that such expenses are personal and are not deductible."

A clearer understanding of the nature of commuting expenses would have resulted if such expenses had been described as "nondeductible business expenses". Such a description would not have obscured the element of choice of a taxpayer in incurring such expenses.

This improper rationale for the nondeductiblity of commuting expenses was injected into the travel expense situation in the case of *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917 (4th Cir. 1945):

> "(3, 4) . . . But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. This is not the same as saying that the word 'home' means 'place of business' although in most cases where deductions for traveling expenses are claimed, the result will be the same."
>
> "(5, 6) Doubtless these considerations give rise to the regulations set out above which confine the deductions for traveling expenses to those which are reasonable and necessary and expressly

> forbid the deductions of commuters' fares. *This prohibition indeed would be unauthorized if the word 'home' were given its ordinary meaning* for there can be no doubt that in a literal sense one who lives in the suburbs and does business in the city must pay travel expenses while absent from his home in the pursuit of business." (Emphasis added).

Thus the classification of commuting expenses as "personal" as above described is a legal conclusion that such expenses are nondeductible. As thus used, the term indiscriminately embraces those expenses which result from the "choice of" or "personal propensities of" the taxpayer and those which are deemed nondeductible under various legal concepts.

As previously noted, there was *no factual* determination by the Court of Appeals below that the expenses in question were "personal". There was no allegation by the Court of Appeals below that petitioners failed to carry their burden of proof of showing the expenses were *not* personal. The Court of Appeals below held that petitioners failed to carry their burden of showing the employment was "temporary". The Court of Appeals below then determined the expenses were not deductible because the places of employments were deemed to be the petitioners' "homes". The Court of Appeals below then *alleged* the expenses were "personal" for the *reason* that the Court itself had already determined them to be nondeductible.

It is submitted that this method of determining whether or not a particular expense is "personal" within the meaning of Section 24(a)(1) is improper. A simple factual determination, without reference to Section 23(a)(1)(A), under the criteria advanced,

will resolve the problem. The legal conclusion that such expense is nondeductible then attaches immediately by force of Section 24(a)(1), *if* the expense be classified as "personal" in the sense that it is incurred as the result of the "choice of" or "personal propensities of" the taxpayer.

It is further submitted that travel expenses are *not* the same thing as commuting expenses. The principle underlying the nondeductibility of commuting expenses ought not be ingrafted upon the problems involved in determining the deductibility of travel expense as was done in the *Barnhill* case.

In conclusion on this point, it is submitted that a determination of the "personal" nature of a particular travel expense should be a simple factual determination. It should not involve a determination of the distinction between deductible and nondeductible business expenses. It should not be a legal conclusion arrived at by first determining that the expense in question is not deductible under Section 23(a)(1)(A).

III

THE DECISION OF THE COURT OF APPEALS BELOW IS ERRONEOUSLY BASED ON A REQUIREMENT NOT FOUND IN THE CONTROLLING STATUTE AND NOT FOUND IN THE CONTROLLING DECISION RENDERED BY THIS COURT

The decision of the Court of Appeals below was bottomed on the doctrine that "the word home as used in Section 23(a)(1)(A) is synonymous with a place of indefinite employment". The pertinent language of the opinion below is as follows (R. 38, 39):

> ". . . If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self-employed, it is essential that the employment away from the established tax

home shall be temporary in contemplation at the time of its acceptance and not indeterminate in fact as it develops. However justified he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expenses at his post of duty is not an ordinary and necessary business expense within the meaning of Section 23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246; *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521."

The case of *Commissioner* v. *Flowers*, 326 U.S. 465, 470, set forth three requirements for the deductibility of travel expenses:

"Three conditions must be satisfied before a traveling expense deduction may be made under Section 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred 'while away from home'.

(3) The expense must be incurred in pursuit of business. This means there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

The pertinent provision of Section 23 of the Internal Revenue Code of 1939 provides:

> Sec. 23. *Deductions From Gross Income.*
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

The provisions of the regulations are as follows (Reg. 118, Sec. 39.23; 26 C.F.R. (1953 Revision) Section 39.23):

> "Sec. 39.23(a)-2. *Traveling expenses.*
>
> (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.
>
> * * * * *
>
> (f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted."

As seen from the above, there is nothing in the statute, the regulations, or the controlling case of

Commissioner v. *Flowers* which establishes temporary employment as a condition of deductibility.

IV

THE CASES WHICH HOLD THAT "HOME IS SYNONYMOUS WITH POST OF DUTY" HAVE ERRONEOUSLY TREATED A MATTER OF EVIDENCE AS A RULE OF LAW

Since the statute, regulations and controlling Supreme Court decision manifestly do not establish "temporary" employment as a requirement of deductibility, it becomes necessary to trace the genesis and development of this doctrine in the lower court decisions.

The doctrine of "temporary versus indefinite" employment is an outgrowth of an earlier doctrine which is referred to as the "home is synonymous with place of business or post of duty" doctrine.

The "home is synonymous with place of business" doctrine was created in the important case of *Mort L. Bixler*, 5 B.T.A. 1181 (1927). This case has been cited no less than 64 times in subsequent decisions and rulings and is the foundation of the all important Fourth Circuit decision of *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945). The crucial language of the *Bixler* case appears in 5 B.T.A. at pages 1183 and 1184, and is as follows:

> ". . . Section 214(a)(1) authorizes a deduction only of *ordinary* and *necessary* expenses in carrying on any trade or business, and in this classification are included salaries paid or incurred and traveling expenses, including meals and lodging while away from home in the pursuit, or carrying on, of such trade or business. In the opinion of the Board, traveling and living expenses are deductible under the provisions of this section only

> while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct and carrying on of a trade or business. A taxpayer may not keep his residence at a point where he is not engaged in carrying on a trade or business, as this petitioner testified was true in this instance, and take a deduction from gross income for his living while away from home."

The consequences of the above language have been far reaching and these words warrant the closest scrutiny. The provisions of Section 214((a)(1) of the Revenue Act of 1921, referred to in the *Bixler* case, are substantially identical to the provisions of Section 23(a)(1)(A) of the Internal Revenue Code of 1939, as amended. (See App. A, p. 2a).

It is apparent that the court in the *Bixler* case was involved with the problem of resolving the "ordinary and necessary" character of the expenditure. This was proper. However, the court denied the deduction to Bixler in the following language (p. 1183):

> ". . . In the opinion of the Board, traveling and living expenses are deductible under the provisions of this section *only while the taxpayer* is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business." (Emphasis added).

The quoted language goes beyond a factual determination that the expense was not ordinary and necessary and denied the deduction to Bixler by creating a rule of substantive law not found in the statute. Thus, in

the *Bixler* case, a *conclusion of fact* to the effect that the expense was not "ordinary and necessary" is not made.

The application of the doctrine that "home is synonymous with post of duty" *eliminates* the necessity of determining as a question of fact, whether or not the pertinent expenses meet any of the three requirements established in *Commissioner* v. *Flowers*, 326 U.S. 465, 470. When this doctrine is applied, petitioners *cannot* meet the statutory requirement that such expenses be incurred while working "away from home" irrespective of the *actual fact* that such expenses *are* incurred away from the home. This result is reached in square conflict with the decision of this Court in the *Flowers* case wherein it said (326 U.S. at p. 470):

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to a deduction is purely a question of fact in most instances."

The basic fallacy of the Bixler doctrine is immediately apparent upon a consideration of its application to varying fact situations. The doctrine is erected in the form of a rule of substantive law. As such, if valid, it should be of uniform application. However, if literally applied it would immediately deny a deduction for travel expenses to *every* taxpayer. A literal application of this doctrine would erase the deduction from the statute entirely. For the doctrine denies the deduction to a taxpayer because he *is* "away from home". The identical fact situation for which the statute created the deduction. Under this doctrine, a taxpayer is deemed to carry his "home" with him to his place of employment. When this doctrine is

applied, *a taxpayer cannot,* in a legal sense, meet the statutory requirement of being "away from home" irrespective of the *actual fact* that he is away from home.

The potential consequences of an unbridled application of the "home is synonymous with post of duty doctrine" have been circumvented by an equally fallacious doctrine which is discussed in succeeding sections herein and which is here described as the "home is synonymous with an indefinite post of duty" doctrine.

The doctrine launched in the *Bixler* case has been frequently followed. As previously stated, it has been cited no less than 64 times. The most important lower court decision which has followed this doctrine is in all probability the decision in the Fourth Circuit of *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945). The doctrine has been a source of confusion and litigation for many years. The observation made by this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, 471 (1946), is no less true today than when made over ten years ago:

> "The meaning of the word 'home' in Section 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Merten's Law of Federal Income Taxation (1942) Sec. 25.82. The Tax Court and the administrative rulings have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner, supra,* (C.C.A. 4). On the other hand, the decision below and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.C.A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See

also *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.C.A. 2)."

"We deem it unnecessary here to enter into or decide the conflict."

The *Barnhill* case has been frequently cited in support of the "home is synonymous with post of duty concept".

The real issue in all of the cases of this type is whether or not the expense in question is required by the business, or is the result of the personal desire, of the taxpayer to live at a distance from his work. The Court of Appeals below grappled with this very problem in the case of *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917, wherein it said:

". . . But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays, which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, *for his own convenience*, at a distance from his business. Such expenditures were not essential to the prosecution of the business . . ." (Emphasis added).

Unfortunately, the Fourth Circuit did not stop with its finding of fact that such expenses were incurred as a result of the personal choice of taxpayer in maintaining his home at a place away from his place of employment. *At this point nothing further was necessary to deny the deduction as a matter of law.* The Fourth Circuit, however, made the following pronouncement which has ever since lent support to the doctrine that "home is synonymous with post of duty" (148 F. 2d at page 917):

". . . and the decision of the Tax Court *cannot* be affirmed without holding that in allowing

> deductions for traveling expenses to one who is away from home on business, the statute implies that the home and the place of business must be in the same general locality. We think that this statute *must* be given this construction and that it may be done without arbitrarily construing the word 'home' as synonymous with the term 'place of business'." (Emphasis added).

It is respectfully maintained that a *factual* finding to the effect that a taxpayer is maintaining his home distant from his place of employment as a matter of personal choice immediately resolves the issue raised by Section 24(a)(1), thereby rendering such expenses nondeductible as a matter of law under Section 24(a)(1).

In conclusion on this point, it is submitted that the doctrine that "home is synonymous with post of duty" was originally created in the *Bixler* case to deny a deduction that was not considered "ordinary and necessary" for business purposes. The *Barnhill* case also used this doctrine to deny a deduction which it considered not "necessary" for business purposes. Unfortunately, however, the application of the doctrine that "home is synonymous with place of business" has resulted in the improper denial of deductions in many instances under factual circumstances where taxpayers were clearly entitled to the deduction.

A typical case which illustrates the unfair and improper result of applying this doctrine is that of *James R. Whitaker*, 24 T.C. 750. In that case taxpayer was employed as an engineer engaged in off-shore construction in Thule, Greenland. His employer's main office was located in New York City. His family was not permitted to accompany him to Greenland. His

employer paid for or reimbursed his transportation expenses but did not reimburse him for meals and lodging on the job. His period of employment lasted 222 days. The Tax Court denied taxpayer a deduction for meals and lodging on the theory that the employment was of "indefinite" duration and hence that this taxpayer's "home" was in Thule, Greenland, for tax purposes.

There are many other cases where the results are equally unfair and improper. (See App. E, p. 8a).

It is submitted that a perspective look at the *Bixler* and the *Barnhill* cases discloses that the doctrine that "home is synonymous with post of duty" was invoked to resolve the problem of whether or not the expenses were "personal" within the meaning of Section 24(a)(1) under *factual* circumstances that warranted a determination that such expenses *were* personal. This belief stems from the following language appearing in those cases. In the *Bixler* case, 5 B.T.A., 1181, 1183, the court said:

> ". . . A taxpayer may not keep his residence at a point where he is not engaged in carrying on a trade or business, *as this petitioner testified was true in this instance*, and take a deduction from gross income for his living while away from home." (Emphasis added).

In the *Barnhill* case (148 F. 2d at p. 917) the court said:

> ". . . But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, *for his own convenience*, at a distance from his business. Such expenditures are not essential to the prosecution

> of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. This is not the same as saying that the word 'home' means 'place of business' although in most cases where deductions for traveling expenses are claimed, the result will be the same." (Emphasis added).

These quotations disclose that in both the *Bixler* and *Barnhill* cases that the courts were in reality resolving the issue raised by Section 24(a)(1) in applying the doctrine that "home is synonymous with post of duty". When applied to this problem there is some justification for the doctrine. It is maintained, however, that this doctrine is improper *in any case* in that it denies a deduction in the form of a rule of substantive law. A proper approach for resolving the problem of Section 24(a)(1) is a simple factual determination as to whether or not under all the circumstances a normal man could reasonably be expected to move his home to his place of employment.

The glaring fallacy in the doctrine that "home is synonymous with post of duty" is revealed by the manner in which the courts have applied it to the problems raised by Section 23(a)(1)(A). Some of the decisions which are summarized in Appendix E border on the incredible. There is no logic and no justification for its use in this manner to produce such results. The words of the statute when compared with the words in this doctrine are exact opposites. The doctrine that "home is synonymous with post of duty" reduces the simple phrase "away from home in pursuit of a trade" found in the statute to senseless jargon.

The doctrine that "home is synonymous with post of duty" is not essential to a determination of the problem. The nature and duration of the employment away from an established residence are *evidentiary facts* to be considered along with all the other pertinent facts in deciding whether or not a normal man could reasonably be expected to move his home to his place of employment. A decision of this issue does not solve the issues raised by Section 23(a)(1)(A). These latter issues are to be solved under the three requirements established by this Court in the *Flowers* case.

V

THE DOCTRINE RELIED ON BY THE COURT OF APPEALS BELOW THAT "A PLACE OF TEMPORARY EMPLOYMENT IS NOT A TAX HOME BUT THAT A PLACE OF INDEFINITE EMPLOYMENT IS A TAX HOME" IS A DEVELOPMENT OF THE DOCTRINE THAT "HOME IS SYNONYMOUS WITH POST OF DUTY". BOTH DOCTRINES ERRONEOUSLY ERECT A MATTER OF EVIDENCE INTO A RULE OF LAW

A search of the authorities to discover the inception of the "temporary versus indefinite" doctrine apparently leads to the decision of this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, 474 wherein this Court said:

> "Travel expenses in pursuit of business within the meaning of Section 23(a)(1)(A) could arise only when the railroad's business *forced* the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad." (Emphasis added).

It seems manifest that this Court did not intend to erect a fourth requirement for deductibility under the provisions of Section 23(a)(1)(A) since the quoted language appears in the same case in which this Court has specifically established that there were *three* re-

quirements for deductibility. There is no reference to "indefinite" employment in the *Flowers* case. This suggests that this Court used the word "temporary" in its normal sense of being opposed to "permanent", rather than in the highly technical sense of being opposed to "indefinite", as that word has come to be defined in the lower court decisions. Petitioners further suggest that the quoted language constitutes an application of the *facts* to the question raised by Section 24(a)(1) as to whether or not the travel expenses in question were personal or business rather than the question raised by Section 23(a)(1)(A) as to whether or not expenses were deductible or nondeductible business expenses. As thus interpreted, the above quoted language is entirely consistent with the three requirements of deductibility established by this Court.

It is again submitted that once a factual determination is made under Section 24(a)(1) that an expense is "personal", such as was made in the *Flowers* case, the expense is immediately rendered nondeductible by force of Section 24(a)(1). Consideration of the problem under Section 23(a)(1)(A) then becomes unnecessary.

The "indefinite" concept appears to have found expression first in the case of *Arnold P. Bark*, 6 T.C. 851 (1946). The pertinent words in that opinion are as follows (6 T.C. at p. 855):

> ". . . What was originally temporary employment had by 1941 become an employment of indeterminate duration."

Since that time the doctrine has appeared in numerous court decisions (App. F, p. 11a). It is of interest to

note that the *Bark* case was decided on April 29, 1946 which was less than four months after the decision of this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, decided on January 2, 1946. The *Bark* decision cited only the *Flowers* and *Bixler* cases in support of its conclusion. It is of further interest to note that Justices Murdock, Turner and Van Fossan dissented from the decision of the Tax Court in the *Bark* case.

The doctrine came to full flower in the case of *Herman C. Ford*, P-H 1954 T.C. Mem. Dec., Par. 54,314, decided November 30, 1954, affirmed, *per curiam*, 227 F. 2d 297 (4th Cir. 1955). In that opinion the Tax Court said (P-H 1954 T.C. Mem. Dec. at page 994):

> "It is now well established that the term 'home' in Section 23(a)(1)(A) is synonymous with 'post of duty'. A taxpayer's employment may lack permanence, that is to say, it may be of an indefinite duration. But if such employment is not obviously temporary, the fact that it is of an indefinite duration does not deprive it of the status of employment at a 'post of duty'."

The above quotation constitutes a fair statement of the doctrine as it now stands in the Fourth Circuit and in the Tax Court.

It is manifest that in respect to the employments of petitioner Stines that the only difference between the employment which the Court of Appeals below considered "indefinite" and those employments of his which it considered "temporary" was the difference in the duration of such employments. The Commissioner has conceded that the employments of petitioner Stines at Charleston, South Carolina, and Fort Bragg, North

Carolina, which occurred in the same taxable year were properly deductible. There have been many cases substantially on all fours within the instant cases which have permitted the deduction (App. G, p. 12a).

It is also manifest that in the application of the "temporary versus indefinite" doctrine in this case, that the single element of the length of time of the employment period resolved the issue. Thus, once the employment is categorized as "indefinite", no factual inquiry under the three requirements of *Commissioner* v. *Flowers* is necessary *or even possible*. For by erecting "temporary" as a requirement, which the court below has defined as "not indefinite", the entire controversy is moved out of the orbit of the *Flowers* criteria and centers on the distinction between "temporary" and "indefinite" employments. Under this approach, a conclusion that the particular employment is "indefinite" immediately denies the deduction. Taxpayer *cannot* now meet the statutory requirement of being "away from home" even though he is *in fact* away from "home". This is so far the reason that the doctrine that "home is synonymous with place of indefinite employment" straps a taxpayer's home to his back, thereby disqualifying such a taxpayer under requirement two of the *Flowers* case, which provides that the expense must be incurred away from home.

This ambiguous result stem from the erroneous erection of a matter of evidence into a rule of law. The duration of the employment is but *one* fact which should be considered along with *all* the other facts in resolving the problem as required by *Commissioner* v. *Flowers*. If "temporary" employment is erected as a fourth requirement, the absurd situation results

whereby a taxpayer can meet squarely the three requirements of *Commissioner* v. *Flowers*, meet squarely the requirements of the statute, and yet be denied the deduction.

This is exactly what has happened in the instant case. If petitioner Stines met the three requirements of *Commissioner* v. *Flowers* while working at Charleston, South Carolina, and Fort Bragg, North Carolina, it stretches credulity to the breaking point to conceive how he failed to meet these requirements in respect to his employment at Kinston, North Carolina. Petitioner Stines had been consistently following a pattern of working and living and the only distinguishable difference in the employments was the length of their duration. The period of employment of petitioner Stines at Kinston was in fact shorter than other periods of employment with respect to which the courts have allowed the deduction. (App. II, p. 14a).

As would logically be expected, the shifting of the area of controversy out from under the requirements of *Commissioner* v. *Flowers* and under the "temporary versus indefinite" issue, has resulted in various additional requirements for qualification for "temporary" employment.

In the instant case the Court of Appeals below said (R. 38):

> ". . . , it is essential that the employment away from the established tax home shall be temporary *in contemplation at the time of its acceptance and not indeterminate in fact as it develops* . . ." (Emphasis added).

In the case of *Beatrice H. Albert*, 13 T.C. 129, which was referred to and distinguished in the decision of

the Tax Court below (R. 28), the Tax Court said (13 T.C. at p. 131):

> "The employment in each case lacked permanence, but on the other hand, was indefinite in duration rather than obviously temporary, *in that it was not the sort of employment in which termination within a short period could be foreseen* as was the situation in *Harry F. Schurer*, 3 T.C. 544, and *E. G. Leach*, 12 T.C. 20. *The suggestion or warning that there might be a change of station upon short notice does not justify extensive discussion* since the evidence fails to show how probable this possibility was, . . ." (Emphasis added).

In the case of *Arnold P. Bark*, 6 T.C. 851 (1946), the Tax Court denied the deduction, saying (6 T.C. at p. 855):

> ". . . Although the petitioner well understood when he accepted his first employment with the Midvale Co. that it was to be for a period of only three or four months, the situation was vastly different so far as it relates to the year 1941. *What was originally temporary employment had by 1941 become an employment of indeterminate duration.*" (Emphasis added).

The case of *Albert P. Tiernan*, P-H 1955 T.C. Mem. Dec., Par. 55,059, involved an electrical worker who was a member of a union with headquarters in Syracuse, New York. Tiernan maintained a residence in Felts Mills, New York. He worked in Schenectady, New York, from sometime in 1947 to August, 1949. He worked in Troy, New York, from August, 1949 to October, 1949. He worked in Saugerties, New York, from October, 1949 until later in 1949. He worked in Andes, New York, for the remainder of 1949. The

Tax Court there held that the employments at Troy, Saugerties, and Andes were temporary, but that the employment at Schenectady was not temporary. Tiernan had been consistently following a pattern of working and living. The only distinguishable difference in the employments was the length of their duration. The instant case is similar to the *Tiernan* case in that the duration of the employments was the determining factor in classifying the employments as not temporary (R. 27).

Thus the cited cases have established various requirements for "temporary" employment.

(1) Termination within a short and fairly definite period must be foreseeable when the employment commences.

(2) There must be some evidence to show that termination within a short period is probable.

(3) The actual time spent in such employment must be short.

(4) Employment may be temporary and become indefinite thereby losing its temporary character.

These are the four "essentials" of "temporary" employment which were successfully developed and used by the now respondent in the proceedings in the Court of Appeals below. Each of these doctrines has been successfully implemented in various cases to characterize employment as not "temporary". (App. I, p. 14a).

From the above it is apparent that the meaning of "temporary" employment is not a simple factual determination but has become a highly technical legal

concept which has developed its own requirements for qualification. The three requirements of *Commissioner* v. *Flowers* have been increased to *seven* requirements, if the doctrine that "home is synonymous with place of indefinite employment" is allowed to stand.

Thus, the consequences of erroneously erecting a matter of evidence into a rule of law become apparent. A rule of law that was originally created to deny the deduction under circumstances that were justifiable has developed into a weapon which unjustly denies the deduction to countless taxpayers. (See App. E, p. 8a). The three factual determinations required by *Commissioner* v. *Flowers* have become lost in a maze of new requirements. It is submitted that the length of the employment period is but one fact which should be considered along with *all* the other facts in determining whether or not a particular taxpayer could normally and reasonably be expected to move his home to his place of employment.

The results described have come about by the erroneous erection of a matter of evidence into a rule of law, by ingrafting this erroneous rule of law onto Section 23(a)(1)(A) when it was originally created to resolve a problem under Section 24(a)(1), and by developing a new set of requirements to meet the concept of "temporary" embodied in the erroneous rule of law.

VI

THE DECISION OF THE COURT OF APPEALS BELOW WAS ERRONEOUS IN THAT IT WAS NOT BASED ON A DETERMINATION OF FACT AS REQUIRED BY THE CONTROLLING DECISION OF COMMISSIONER v. FLOWERS

In the case of *Commissioner* v. *Flowers*, 326 U.S. 465, 470, this Court said:

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to

> a deduction is *purely a question of fact* in most instances." (Emphasis added).

It is also noted that the *Flowers* case made a *factual* determination that the expenses in question were "personal" within the meaning of Section 24(a)(1). The Court said in respect thereto (326 U.S. at p. 473):

> "The *facts* demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad." (Emphasis added).

The Commissioner denied the deductions in controversy on the grounds that the expenses were "personal or living" expenses. The Tax Court determined, as a *conclusion of fact*, that such expenses were *not* personal. The Court of Appeals below did not dispute this conclusion of fact of the Tax Court. The Court of Appeals did not hold that there was a failure of proof as to any of the three requirements of the *Flowers* case. The Court of Appeals below held that there was a failure of proof to show that the work was temporary. As previously noted, temporary employment is not a requirement of deductibility. It is further submitted that there are ample facts in the record to support the conclusion of the Tax Court that the work *was* "temporary" in nature.

The Court of Appeals below *alleged* the expenses were personal saying (R. 38):

> ". . . That an employee for reasons personal to himself and his family maintains a home at a distance from his business does not serve the business of the employer and ordinarily his travel expense and the expense of his maintenance at other place is not deductible. *Commissioner* v. *Flowers*, supra.

Barnhill v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210."

This conclusion was not based on a determination of fact but resulted from applying the doctrine that "home is synonymous with a place of indefinite employment". The determination of "personal" was thus the result of denying deductibility under Section 23(a)(1)(A). The fallacy of this conclusion is revealed by the paradoxical fact that the Court of Appeals itself *apparently admitted that on the basis of the facts the expense was not personal.* Said the Court of Appeals below. (R. 38, 39):

". . . *However justified* he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary expense within the meaning of Section 23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521.

* * * * *

". . . *And though subjective consideration of the reasonableness of their moving their residences to their post of duty may have some bearing in determining the applicability of Sec. 24(a)(1)*, it does not establish the deductibility of maintenance expenses under Sec. 23(a)(1)(A). *Bercaw* v. *Commissioner, supra; Warren* v. *Commissioner*, 13 T.C. 205; *Whitaker* v. *Commissioner*, 24 T.C. 750." (Emphasis added).

The logical meaning of this latter quotation would clearly seem to be that the *Court of Appeals itself deemed the expenses not personal within the intendment of Section 24(a)(1) as a question of fact.* This is the exact issue on which the respondent disallowed the expenses. It now appears that both the Tax Court and the Court of Appeals below have reached the same conclusion *of fact, which is that the expenses in controversy were not personal.*

It is to be further noted that the Court of Appeals has granted the respondent a presumption to which he is not entitled. Petitioners recognize that a presumption exists that the Commissioner's determinations are correct. However, in the instant case *there was no allegation by the Commissioner that the employments were indefinite.* The Commissioner's determination was limited to the sole proposition that the expenses were "personal and living" expenses. (R. 21). The Court of Appeals below reversed the Tax Court on the basis of a failure of petitioners to carry their burden of proof to show that the work was "temporary". Said the Court of Appeals (R. 39):

> "When the taxpayers in these cases went into the Tax Court, carrying the burden of showing that the Commissioner's determination was incorrect, they produced nothing to show that their employment on the duPont project was not of indefinite duration."

The Commissioner did not determine the employments were indefinite.

This error of the Court of Appeals in thus giving the respondent a presumption of correctness in respect to an issue to which he is not entitled again illustrates

the error in erecting a matter of evidence into a rule of law. The opinion of the Court of Appeals below is not based on a factual determination as required by *Commissioner* v. *Flowers*.

Finally, it is submitted that the facts fully sustain the determination by the Tax Court that the employment was temporary in fact. There are many cases which have allowed a deduction for travel expenses under substantially identical fact situations (App. G, p. 12a).

The facts show that the taxpayers were construction workers and were engaged in construction work when the expenses in controversy were incurred. The facts further show that each of the taxpayers was employed on many and various construction projects in various locations lasting for periods varying from 1 week to 20½ months. That taxpayers entered upon the employments in question in the customary manner in which they followed their trade. The only feature which distinguishes the employments at Kinston from the other employments engaged in by the petitioners is the longer duration of such employments. The Commissioner has conceded that similar expenses incurred with respect to other employments of petitioner Stines for the taxable year are deductible. It is self evident that as regards those persons engaged in construction, for both employees and employers alike, a construction site is not a regular place of employment of anybody. And it inevitably follows, that upon completion of the construction project, all persons so engaged must seek employment elsewhere.

The facts show that the pattern of employment of all the petitioners was temporary and intermittent.

Construction work by its very nature *must* terminate in a relatively short period of time. Such factors as inclement weather, material shortages and work stoppages produce unforseen terminations of employments. Termination is not only foreseeable and probable but foreseeable and certain. Absent some extraordinary factor, it seems manifest that such employment is temporary.

VII

THE COURT OF APPEALS BELOW ERRONEOUSLY DETERMINED THAT TRAVEL EXPENSES WERE NOT DEDUCTIBLE UNLESS REQUIRED BY THE EXIGENCIES OF THE EMPLOYER'S BUSINESS

The decision of the Court of Appeals below erroneously determined that travel expenses of an employee are deductible only if incurred by the exigencies of the employer's business. In this respect the Court of Appeals below said (R. 38):

> ". . . Indeed under the rule of *Commissioner* v. *Flowers* the expense, in order to be deductible, must be 'required by the exigencies' of the employer's business, not those of the calling of the employee."

In respect to this issue this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, 470 said:

> "(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business *of the taxpayer* or of his employer." (Emphasis added).

Thus, it is apparent that it is not essential to a decision of the instant proceeding to decide whether or not the expenses were incurred in respect to the trade or business of the taxpayer or of his employer since this

Court recognizes that both classes of expenses may be deductible.

The fallacy of this position of the Court of Appeals below is further disclosed by the many cases which have allowed the deduction in substantially identical fact situations (App. G, p. 12a). Further, the respondent has conceded that the expenses of the petitioner Stines at Charleston, South Carolina, and Fort Bragg, North Carolina, were deductible. The relationship of the expenses to the employment was the same in all of these cases.

Finally, it is submitted that the position of the Court of Appeals below that the expenses were not required by the exigencies of the employer's business is subject to dispute. The facts show that heavy construction depends upon a mobile labor force. Travel by construction workers is absolutely essential to the welfare of the industry. This is conceded by the Court of Appeals below when it said (R. 37):

> ". . . It is also a characteristic of the industry, as shown in the stipulation in this case, that upon larger construction projects outside metropolitan centers, the local supply of the necessary skills *must* be greatly augmented by workers coming from other places. Work in the industry, therefore, is, to some extent, transient as well as impermanent." (Emphasis added).

VIII

IN REACHING ITS DECISION, THE COURT OF APPEALS BELOW USED AN IMPROPER FACTOR IN CONTRAVENTION OF THE THIRTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

In its opinion the court below made reference on numerous occasions to the voluntary terminations of some of the employments of the petitioners. The fre-

quency of such references creates a convincing conclusion that such voluntary terminations of their employments by the petitioners influenced the decision of the court below. The references in the opinion are as follows:

* * * * *

"... The record does not indicate whether any of these employments were terminated for cause, in consequence of completion of the work or for reasons personal to the taxpayer." (R. 34).

* * * * *

"... It is stipulated that he left this employment for personal reasons." (R. 35).

(Footnote). "Stines testified that the 'personal reason' for his leaving was that he was discharged after walking off the job during working hours to attend to a personal errand." (R. 35).

* * * * *

"... This employment began October 21, 1952, and ended on July 10, 1953, when he resigned for reasons personal to him." (R. 35).

* * * * *

"... He resigned for personal reasons from his jobs at Portsmouth, Aiken and Hopewell as well as from that at Kinston." (R. 35).

* * * * *

"... We are informed that when Stines and Hall quit their jobs at Kinston in April and July 1953, respectively, they did so for personal reasons, not because work for people of their trades was no longer available. The reason for Peurifoy's leaving in November 1953 is not mentioned." (R. 36).

The purport of the above language seems clear. The court below seeks to deny to taxpayers who quit their jobs voluntarily the status of "temporary" in respect

to such employments by concluding these employments could ripen into "indefinite" employment if petitioners had not "quit" their jobs. The result is to deny such a taxpayer a deduction to which he might otherwise be entitled because he cannot now meet the requirements of "temporary employment" which has become established in the Fourth Circuit and in the Tax Court decisions.

It is of interest to note that the Tax Court attached little or no significance to the voluntary terminations of employment of petitioners as evidenced by its conclusion and also by the fact it made but two references to such voluntary terminations in its findings of fact. (R. 22, 23).

Any doubt as to the conclusion that this factor influenced the Court of Appeals below in reaching its decision would seem to be dispelled by the following language which appears in the opinion portion of that decision (R. 39):

> ". . . It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. *For aught that appears, work might have been available there for all three for much longer than 20½ months.*" (Emphasis added).

The final result is to apply the tax laws of the country in a manner that penalizes a taxpayer for the sole reason that he quit his job of his own volition or even because he was discharged.

Such an application of the tax laws exercises a coercive influence on a taxpayer and tends to force him to continue work against his will. Such an application

of the tax laws of this country deprives a taxpayer of a free choice in selecting his place of employment and is in contravention of the Thirteenth Amendment of the Constitution of The United States which prohibits involuntary servitude. (U.S. Const., Amend. XIII, App. A, p. 1a)

The purposes and objectives of the Thirteenth Amendment to the Constitution of The United States were set forth by this Court in the case of *Pollock* v. *Williams*, 322 U.S. 4 (1944) wherein it said (p. 17):

> "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery *but to maintain a system of completely free and voluntary labor throughout the United States.* Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment *is the right to change employers.*" (Emphasis added).

The Antipeonage Act is now 42 U.S.C. Sec. 1994 (App. A, p. 1a).

In this respect, it is to be noted that if the decision of the Court of Appeals below is allowed to stand, it erects a new requirement for qualification for "temporary" employment. For under the decision below petitioners apparently cannot qualify for "temporary" employment if they voluntarily quit their jobs. This would raise the requirements for deductibility to eight instead of three as established in the *Flowers* case.

CONCLUSION

From the foregoing it is respectfully submitted that the Court of Appeals below erred in the respects hereinabove indicated and erred in concluding that the expenses in controversey were not deductible.

The evils resulting from the application of the doctrine that "a taxpayer's home *shifts* to every place of indefinite employment" are far reaching. As an erroneous doctrine, it has the effect of imposing a disproportionate tax burden onto a relatively low income class of taxpayers. It results in discriminatory treatment in that the doctrine is not known to be applied to employers, but has been limited in its application to employees.

It foments unrest and labor turnover in that the doctrine encourages construction workers to prematurely quit their jobs in the hope of retaining the character of "temporary" with respect to such employment. By denying a deduction for travel expenses, it encourages workers to leave the construction industry to avoid the extra expense and seek more stable employment, thereby depriving the construction industry of a reserve mobile labor force on which it is highly dependent.

It denies a deduction to construction workers on jobs of relatively longer duration, thereby depriving such workers of a deduction when such expenses are greater and the need for such a deduction is correspondingly greater.

It denies to a construction worker the right to establish a permanent home *anywhere* for tax law purposes. It thus encourages such taxpayers to uproot established homes and become migrants. The social evils of migrant living are manifest. There is a break-

down in family living and security. Children must be untimely taken from one school and reestablished in another. Congested living conditions at a construction site are intensified and aggravated. Trailer living or shanty town dwellings become essential to survival because of sky rocketing rents. Frequently there is a breakdown of essential public services such as schools, electrical, water and police facilities at construction areas.

Such conditions are a matter of common knowledge. It is not proper that such results should be encouraged and cultivated by torturing and twisting the language of a relatively simple statute to reach a result directly opposite to the original intent of the statute.

Finally, it is submitted that meaning of the statute, as expounded under the theory that "a home shifts to a place of indefinite employment," has become a nightmarish riddle incapable of solution from the construction workers point of view. The nature of the work is such that he cannot be given any assurance of the duration of a particular employment. If he moves his family with him to avoid the extra expense, anyone of a number and unforseen factors can produce a sudden lay-off. If he leaves his family at home and the work lasts "too long", he loses his deduction for travel expenses. No one can prophesy for certainty how long a not "too long" or "temporary" job can last under the present state of the law. If he quits his job in order to keep the time "short", he loses the deduction under the rationale of the Court of Appeals below. If he continues to work, the job "becomes indefinite" and he loses the deduction. If he fails to procure evidence of the "probable short

duration" he loses the deduction even though the duration is actually "short".

It is not believed that the Congress of the United States enacted the statutes here involved with an intent to produce the results above described and which now exist as a result of decisions of the Tax Court and of the United States Court of Appeals For The Fourth Circuit. It is respectfully submitted the decision of the Court of Appeals below should be reversed.

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